

May 8, 1995

Dr. Barry Coyne, Administrator
Sex Offender Treatment Program
Corrections Program Services
Department of Public Safety
919 Ala Moana Boulevard
Honolulu, Hawaii 96814

Dear Dr. Coyne:

Re: Sex Offender Custody Level Review Form

This is in response to your letter to the Office of Information Practices ("OIP") concerning public access to the above-referenced form currently being developed by the Department of Public Safety ("PSD").

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the information contained on the PSD's proposed Sex Offender Custody Level Review form ("Form") must be made available for public inspection and copying, upon request.

II. Whether, under Part III of the UIPA, entitled "Disclosure of Personal Records," the information contained on the Form must be made available for inspection and copying by the inmate to whom the Form pertains.

BRIEF ANSWERS

I. Certain items of information contained on the Form, such as the name of the facility in which the inmate is incarcerated, and the circuit in which the inmate was sentenced, ordinarily are not protected by any of the UIPA exceptions to required agency disclosure in section 92F-13, Hawaii Revised Statutes. However, because the classification of a "sex offender" includes inmates who: 1) were charged but not convicted of a sex offense as an adult; 2) have a prior juvenile record of a sex offense; or 3)

Dr. Barry Coyne
May 8, 1995
Page 2

have exhibited deviant behavior while incarcerated, the mere fact that an inmate is the subject of the Form may reveal information protected by State statute.¹ Moreover, even if the name and identification number of the inmate is segregated from the Form, it is still possible to determine the identity of the inmate through the conviction information, such as the criminal case number. We also believe that a requester may be able to identify a sex offender inmate by linking information on the Form with information from other records that generally is not protected under the UIPA, such as the circuit in which the inmate was sentenced, the parole eligibility date of the inmate, and the inmate's case manager. Because the disclosure of the information contained on the Form, even with the name and identification number of the inmate segregated, could lead to the likelihood of actual identification of the inmate, we believe that the Form is not reasonably segregable of individually identifying information and, thus, the Form in its entirety must be withheld from public inspection under section 92F-13(4), Hawaii Revised Statutes. For the same reason, we also believe that the information on the Form is protected by the UIPA's "personal privacy" exception in section 92F-13(1), Hawaii Revised Statutes.

II. Section 92F-22(1)(B), Hawaii Revised Statutes, provides that an agency is not required to grant an individual access to a personal record if the record is: (1) "[m]aintained by an agency that performs as its or as a principal function any activity pertaining to the prevention, control, or reduction of crime," and (2) if the record constitutes a report "prepared or compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision."

Under section 26-14.6(b), Hawaii Revised Statutes, the PSD is charged with "the formulation and implementation of state policies and objectives for correctional, security, law enforcement, and public safety programs and functions" and also with "the administration and maintenance of all correctional

¹ The fact that an inmate was previously charged with, but not convicted of a sexual offense, or that an inmate has a juvenile history record involving a sexual offense, is protected from disclosure by statute. Section 846-9, Hawaii Revised Statutes, provides that "nonconviction" data, arrest information that did not result in a conviction, is protected from disclosure. Under section 846-12, Hawaii Revised Statutes, juvenile criminal history information must be withheld from disclosure.

Dr. Barry Coyne
May 8, 1995
Page 3

facilities and services." Consequently, we believe that the PSD performs, as a principal function, activities pertaining to the "prevention, control, or reduction of crime" within the meaning of section 92F-22(1), Hawaii Revised Statutes.

The Form, which will be completed by the inmate's case manager, will contain relevant information about the inmate's criminal history background as well as behavior exhibited during incarceration. Based upon this information on the Form, as well as other information from the inmate's Sex Offender Treatment Program ("SOTP") records, the SOTP Administrator will make a recommendation whether a sex offender inmate can be transferred to a lower security facility or to furlough status. After making the recommendation, the SOTP Administrator will forward the Form to the PSD's Classification Office, which will either begin processing the inmate's transfer or deny the request for transfer. Thus, in our opinion, the Form constitutes a report about the inmate prepared by the inmate's case manager and the SOTP Administrator for use by the PSD's Classification Office in its processing of transfer requests. We believe that the Form, when completed, may be withheld from the inmate to whom it pertains under section 92F-22(1)(B), Hawaii Revised Statutes, because the Form is maintained by the PSD and constitutes a report "prepared or compiled" during the confinement or correctional supervision stage of the criminal law enforcement process.

FACTS

The PSD has developed a new form to assist its Classification Office with the clearance of sex offender inmates for transfer between facilities. All sex offenders initially are incarcerated either at Halawa Correctional Facility on Oahu ("Halawa"), a medium security facility, or at Kulani Correctional Facility on the Big Island ("Kulani"), a minimum security facility. An inmate may be transferred from Halawa to Kulani, or from either of these two facilities to furlough status at a community correctional center on Oahu, Maui, the Big Island, or Kauai.

Currently, to initiate the paperwork to transfer an inmate to a minimum security facility or to furlough status, the inmate's case manager completes a set of forms and forwards the forms to the Classification Office. If the inmate is a sex offender, the Classification Office must obtain clearance from the SOTP Administrator before proceeding with the transfer. The SOTP Administrator reviews the inmate's institutional files before making the recommendation for or against the transfer.

Dr. Barry Coyne
May 8, 1995
Page 4

Because most of the information contained on the Form will be completed by the inmate's case manager, who is already familiar with the inmate's background, the PSD believes that the Form will streamline and simplify the clearance and transfer procedures for incarcerated sex offenders.

The Form will contain some general information such as the inmate's name, identification number, parole eligibility date/early parole hearing, case manager's name, current incarceration at Halawa or Kulani, the court circuit in which the inmate was sentenced, conviction information such as the criminal case number, and whether the inmate's incarceration was due to conviction for a sexual offense. In addition, the Form will also contain a checklist of items indicating why the inmate qualifies as a sex offender; any health, psychiatric, substance abuse, or other factors observed during incarceration that may be relevant to the inmate's transfer; and whether the inmate denies needing treatment and refuses to participate in the SOTP. At the bottom of the page, the SOTP Administrator will include comments, if any, regarding the inmate's participation in the SOTP and the Administrator's recommendation concerning the inmate's transfer to a minimum security facility or to furlough status.

We understand that an inmate classified as a "sex offender" has not necessarily been convicted of a sex offense, often as a result of plea bargaining. An inmate may also be classified as a sex offender by the PSD if the offense for which he was convicted was sexually motivated. In addition, sex offenders include those inmates not currently incarcerated for sex offenses, but who have had prior charges or convictions of sex offenses as an adult or as a juvenile, or if deviant behavior was exhibited during incarceration.

If a felony sex offender inmate denies the need for treatment or refuses to participate in treatment for sexual deviance, the SOTP Administrator will recommend that the inmate not be transferred to a minimum security facility or to furlough status.

DISCUSSION

I. INTRODUCTION

Unless protected by one of the UIPA's exceptions contained in section 92F-13, Hawaii Revised Statutes, "[e]ach agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev.

Dr. Barry Coyne
May 8, 1995
Page 5

Stat. § 92F-11(b) (Supp. 1992). Based upon our review of the PSD's Form, we need only examine one of the five UIPA exceptions to required agency disclosure under Part II of the UIPA to determine whether the Form must be publicly disclosed.

II. RECORDS PROTECTED BY STATUTE

Records that are protected from disclosure by state or federal law, or an order of any state or federal court, are not required to be disclosed by an agency under the UIPA. See Haw. Rev. Stat. § 92F-13(4) (Supp. 1992). Section 846-12, Hawaii Revised Statutes, prohibits the disclosure of records concerning "proceedings relating to the adjudication of a juvenile as a delinquent or in need of supervision (or the equivalent) in family court to noncriminal justice agencies."

Further, section 846-9, Hawaii Revised Statutes, limits the disclosure of adult "nonconviction data." The term "nonconviction data" is defined in section 846-1, Hawaii Revised Statutes, as:

[A]rrest information without a disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals.

Haw. Rev. Stat. § 846-1 (1985).

Criminal conviction data is not protected from public disclosure under the UIPA. See OIP Op. Ltr. No. 89-7 (Nov. 20, 1989); OIP Op. Ltr. No. 91-1 (Feb. 15, 1991); OIP Op. Ltr. No. 91-8 (June 24, 1991); OIP Op. Ltr. No. 92-23 (Nov. 18, 1992). Thus, the fact that an inmate is identified on the Form, but is currently incarcerated for an offense other than a sex offense, would reveal that the inmate was either charged, but not convicted of a sex offense as an adult, or that the inmate has a prior charge or conviction of a sex offense as a juvenile. Moreover, even if the inmate's name and identification number are segregated from the Form, it is still possible to identify the inmate through the conviction information (the criminal case number) contained on the Form. Also, because information such as the circuit in which an inmate is sentenced, the inmate's parole

Dr. Barry Coyne
May 8, 1995
Page 6

eligibility date, and the inmate's case manager would not normally be protected under the UIPA, we believe that a requester would be able to identify an inmate who is the subject of the Form by linking the aforementioned information contained on the Form with the same information that would be public in other records about an inmate.² Because many of the items of information on the Form, even with the inmate's name and identification number segregated, could lead to the likelihood of actual identification of an inmate who is the subject of the Form³ and would thus reveal information protected by sections 846-9 and 846-12, Hawaii Revised Statutes, we believe that the PSD may withhold completed copies of the Form in its entirety from public inspection and copying under section 92F-13(4), Hawaii Revised Statutes. For the reasons stated above, we also believe that disclosure of the information on the Form would constitute a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes.

Next, we will examine whether an inmate who is the subject of the Form is permitted to inspect and copy the Form under part III of the UIPA.

III. INMATES' ACCESS TO THEIR OWN FORM

Part III of the UIPA governs the disclosure of "personal records" to the individual to whom they pertain. The term "personal records" is defined in pertinent part as "any item, collection, or grouping of information about an individual that is maintained by an agency." Haw. Rev. Stat. § 92F-3 (Supp. 1992). Section 92F-22, Hawaii Revised Statutes, provides general exemptions to the agency's duty to permit individuals to inspect and copy their personal records.

²In OIP Opinion Letter No. 91-24 (Nov. 26, 1991), the OIP found that the examination scores on the certified list of eligibles, with the names of the unsuccessful eligibles segregated, would be public under the UIPA only if such segregation would protect the identities of the unsuccessful eligibles. If an examination score "can be identified with the respective individual even after segregation, then disclosure to the public will not be permitted in order to protect the individual's right to privacy." OIP Op. Ltr. No. 91-24 at 5.

³The U.S. Supreme Court, in Dep't of the Air Force v. Rose, 425 U.S. 352, 380, n.19 (1976), explained that the likelihood of actual identification must be "more palpable than mere possibilities."

Dr. Barry Coyne
May 8, 1995
Page 7

One of the exemptions in section 92F-22, Hawaii Revised Statutes, states that an agency that performs as its principal function, activities pertaining to the "prevention, control, or reduction of crime" is not required to grant an individual access to personal records that consist of "[r]eports prepared or compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision." Haw. Rev. Stat. § 92F-22(1)(B) (Comp. 1993) (emphasis added).

In a previous OIP advisory opinion, we noted that section 92F-22(1), Hawaii Revised Statutes, is nearly identical to exemption (j)(2) of the federal Privacy Act, 5 U.S.C. § 552a (j)(2) (1988). See OIP Op. Ltr. No. 93-7 at 6, n.1 (July 27, 1993). In that opinion, we also noted that in Duffin v. Carlson, 636 F.2d 709, 711 (D.C. Cir. 1980), the D.C. Circuit Court of Appeals found that a criminal law enforcement agency includes the federal Bureau of Prisons. The duties and purposes of the Department of Public Safety are set forth in section 26-14.6(b), Hawaii Revised Statutes, which states that:

The department of public safety shall be responsible for the formulation and implementation of state policies and objectives for correctional, security, law enforcement, and public safety programs and functions, for the administration and maintenance of all correctional facilities and services, for the service of process, and for the security of state buildings.

Haw. Rev. Stat. § 26-14.6(b) (Supp. 1992) (emphasis added).

Based upon the foregoing, we are of the opinion that the PSD falls within the term "criminal law enforcement agency" for purposes of section 92F-22(1)(B), Hawaii Revised Statutes. Next, we examine whether the Form constitutes a "report" within the meaning of this exemption.

The portion of the Form concerning the inmate's background of sex offenses, as well as noteworthy factors and behavior observed during current incarceration, will be completed by the inmate's case manager. The Form then will be forwarded to the SOTP Administrator who will review the inmate's institutional files and decide whether to recommend that the inmate be transferred to a minimum security facility or to furlough status.

Based upon the SOTP Administrator's recommendation on the Form, the Classification Office will either proceed with the transfer

or deny the transfer.

In Turner v. Ralston, 567 F. Supp. 606 (W.D. Mo. 1983), a prison classification report was withheld from the prisoner to whom the report pertained under Exemption (j)(2) of the Privacy Act.⁴ The Bureau of Prisons explained, in an administrative regulation, that withholding physical and mental health records from the inmate to whom such records pertain is:

[E]ssential to protect internal processes by which Bureau personnel are able to formulate decisions and policies with regard to federal prisoners, to prevent disclosure of information to federal inmates that would jeopardize legitimate correctional interests of security, custody, or rehabilitation, and to permit receipt of relevant information

⁴The Privacy Act, Exemption (j)(2), provides in pertinent part:

The head of any agency may promulgate rules
. . . to exempt any system of records within
the agency from any part of this section
. . . if the system of records is:

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- (2) Maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of:

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- (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

5 U.S.C. § 552a(j)(2)(C) (1988).

Dr. Barry Coyne
May 8, 1995
Page 9

from other federal agencies, and federal and state probation and judicial officers.

Turner at 608, quoting 28 C.F.R. §16.97(b)(3).

Moreover, in case law interpreting FOIA's Exemption 7, which protects law enforcement records or information from disclosure, reports containing information about the inmate such as mental health assessments have been withheld from the inmate to whom the report pertains. See U.S. Dep't of Justice v. Julian, 108 S.Ct. 1606, 100 L.Ed.2d 1 (1988) (presentence reports required by Rule 32 of Federal Rules of Criminal Procedure to be disclosed to inmates who are subjects of reports, except as to confidential sources and diagnostic opinions).

In our opinion, the Form can be considered a law enforcement report which contains the inmate's background information, prepared by the inmate's case manager, as well as the SOTP Administrator's recommendation concerning the transfer. This report is used by the Classification Office to either process the transfer or to deny the inmate's request to transfer. Consequently, we believe that the Form may be withheld from the inmate to whom it pertains as a "report[] prepared or compiled" during an inmate's "confinement, correctional supervision, and release from supervision" under section 92F-22(1)(B), Hawaii Revised Statutes.

CONCLUSION

Although the UIPA generally mandates the disclosure of government records, there is an exception to disclosure for those government records that are required to be withheld by State or federal statute. See Haw. Rev. Stat. § 92F-13(4) (Supp. 1992). Sections 846-1 and 846-12, Hawaii Revised Statutes, govern the disclosure of records concerning non-conviction data and juvenile criminal proceedings, respectively. Because the mere fact that an individual is the subject of the completed form may reveal that an inmate was charged but not convicted of a sex offense, or that the inmate has a juvenile history of a sex offense, and also because many of the items of information on the form could lead to the likelihood of actual identification of the inmate even if the inmate's name and identification number are segregated, we believe that the Form, when completed, must be withheld from public disclosure under section 92F-13(4), Hawaii Revised Statutes. For the same reasons, we believe that the information on the Form is also protected by the UIPA's "clearly unwarranted invasion of personal privacy" exception in section 92F-13(1), Hawaii Revised Statutes.

Dr. Barry Coyne
May 8, 1995
Page 10

In addition, the Form is also protected from inspection and copying by the inmate to whom the Form pertains. Section 92F-22(1)(B), Hawaii Revised Statutes, provides an exemption from personal records disclosure for reports maintained by law enforcement agencies, including those reports prepared or compiled during "confinement, correctional supervision, and release from supervision." Because the Form contains pertinent background information about the inmate as a sex offender and also because it contains the SOTP Administrator's recommendation concerning transfer to a minimum security facility or to furlough status, we believe that the Form, when completed, may be withheld from the inmate to whom the Form pertains under section 92F-22(1)(B), Hawaii Revised Statutes.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

SML:sc

c: The Honorable George Iranon
Director, Department of Public Safety